



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.
LAURENCE QUINTANO**

Sitting of the 3rd March, 2010

Number. 13/2010

**The Police
(Inspector Dennis Theuma)**

Vs

Geza Attila Balla

The Court

Having seen the charges preferred againsta Geza Attila Balla, 26 years old, son of Attila and Eva nee Vepz, born in Budapest, Hungary, on the 11th April 1983, residing in London, Worland Road No 36 E 15 4EY, Stratford, United Kingdom, and holder of passport number ZJ477298 issued in Hungary

Being accused of having in these islands on the night between the 29th and the 30th January 2010 and in the preceding days:

Conspired with another one or more persons on these Islands or outside the Maltese Islands for the purpose of selling or dealing on these Islands the psychotropic and restricted drug (cathinone) in breach of article 120A of the Medical and Kindred Professions Ordinance, Chap 31 Laws of Malta, and Legal Notice 22 of 1985 as amended or constituted, organized or financed such conspiracy.

Conspired with another one or more persons on these Islands or outside the Maltese Islands for the purpose of selling or dealing on these Islands in the psychotropic and restricted drug (cathine) in breach of article 120 A of the Medical and Kindred Professions Ordinance, Chap 31 Laws of Malta, and Legal Notice 22 of 1985 as amended or constituted, organized or financed such conspiracy.

Imported or offered to import psychotropic and restricted drug (cathinone) without a special authorization in writing by the Superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended.

Imported or offered to import psychotropic and specified (cathine) without having proper authorization, in breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended.

Been in possession of psychotropic and restricted drug (cathinone) without a special authorization in writing by the Superintendent of Public Health, in breach of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as

amended, under such circumstances that such possession was not intended for his personal use.

Been in possession of psychotropic and specified drug (cathine) without having proper authorization, in breach of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta and the Drug (Control) Regulations, Legal Notice 22 of 1985 as amended, under such circumstances that such possession was not intended for his personal use.

Having seen all the documents in the file including the order of the Attorney General of the 31st January 2010, the Not guilty plea filed by the defendant, the statement made by the defendant at Police Headquarters on the 30th January 2010 (fol 12 et), the second statement by the defendant on the same date at 3 pm (fol 16), the process verbal drawn up by Magistrate Dr Audrey Demicoli (fol 41), the confirmation of the experts appointed during the inquiry (fol 38), the report drawn up by Mr. Martin Bajada (fol 44), the report drawn up by Mr Mario Mifsud (fol 54), the report drawn up by PC 122 Arthur Borg and the translation from Magyar to English of the messages in the mobile phone of the accused.

Having heard the witnesses on oath.

Having heard the final submissions of the Prosecution and the defence.

Has considered.

The facts of this case are as follows. On the night of the 29th to 30th January 2010, before retrieving his bag, the defendant approached senior customs assistant Saviour Buhagiar and informed him that he (the defendant) needed help. The defendant informed the customs assistant that he (the defendant) had imported 'khat' and that this was in the defendant's luggage. The luggage was full of khat plants. The contact person was waiting outside.

The defendant never mentioned the chemical substances at the basis of khat.

Forensic analysis revealed that there were only 22 grams of cathine, which substance falls under category B of the Schedule in Chapter 31 of the Laws of Malta. Extracting the cathine from these plants is a difficult procedure and a laboratory is indispensable. You have an expert to carry out the exercise.

In his statement to the Police, the defendant said that he had read that khat contains the substance cathine. When someone chews the plants he also 'ingests' the cathine and this makes him feel high. He was also aware that the khat plant grows in Yemen and Australia but not in Somalia or in Somaliland though the Somalis are the main consumers of the plant. The defendant was also aware that khat is illegal in Somalia but not in Somaliland. As to the word 'cathinone', the defendant said that he had never heard the word used.

The Prosecution referred to the case 'The Police vs Khayre Aweys' decided by the Criminal Court of Appeal (Inferior) on the 3rd July 2009.

In that judgement the Court distinguished between **the intention** to import khat and **the intention** to import any of the substances which form the chemical basis of the plant, which substances are controlled by Chapter 31 of the Laws of Malta.

The main argument of the Prosecution was that once the defendant was aware of one of the chemical elements, then he the defendant had the intention to import the prohibited drug into Malta.

The Court takes an entirely different view. There is a great difference between being aware of the substances forming a particular plant and intending to import the underlying substance.

The Court has considered the following:

(a) From a careful examination of what the defendant told the Customs Assistant, the Court finds absolutely no shred of evidence that he intended to import *cathine* or cathinone. What the defendant was concerned about was 'khat'. He never even mentioned the technical words to the customs assistant. The defendant was under the impression that khat is a controlled drug in Malta. However, this was a wrong impression as neither Chapter 31 nor Chapter 101 of the Laws of Malta consider 'khat' as a controlled drug. **It is only the underlying drugs which are controlled.** But, as the judgment referred to above made clear, there are many substances which have a controlled chemical make up but without the substances themselves being illegal or controlled.

(b) The defendant had not even heard the word 'cathinone' used before his meeting with the police official and it is this drug which falls under Category A and for which a prison tariff is mandatory. He was only aware of the force of cathine but his intention was not to import the cathine but to import the drug khat.

(c) The drug khat is not controlled by Maltese law. (Refer to the judgment mentioned above).

The Prosecution has preferred a number of charges of conspiracy against the defendant. The charge of conspiracy subsists from the moment when the agreement is made and even if the substance involved is just 'baking powder', then the conspiracy would still be considered as having been completed.

The Court of Criminal Appeal (Superior) had held as follows:

'A person may be found guilty of, say, conspiracy to import heroin into Malta, even though the stuff that he eventually brings into Malta turns out to be baking powder. It all depends on what was actually agreed

between the conspirators, and more specifically, on the object of the conspiracy.’¹

But after establishing this principle one has to consider whether the Prosecution has presented evidence that such an association really existed.

The Court here refers to the judgement decided by the Court of Criminal Appeal (Superior) of the 5th March 2003 ‘The Republic of Malta versus Steven Caddick and Philip Walker.’ In this case, the Court held:

‘Under our law the substantive crime of conspiracy to deal in a dangerous drug exists and is completed from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons (Section 22(1A) (Chapter 101). Mere intention is not enough. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting, and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. If instead of mere agreement to deal and agreement as to the mode of action there is a commencement of the execution of the crime intended, or such crime has been accomplished, the person concerned may be charged both with conspiracy and the attempted or consummated offence of dealing, with the conspirators becoming co-principals or accomplices. Even so, however, evidence of dealing is not necessarily going to show that there was (previously) a conspiracy, and this for a very simple reason namely that two or more persons may contemporaneously decide to deal in drugs without there being between them any previous agreement.

The First Court correctly stated that the three elements that had to be proved for the crime of conspiracy to result were:

(i) The agreement between two or more persons

¹ The Republic of Malta versus Steven John Lewis Marsden 23rd October 2008

- (ii) *the intention to deal in drugs*
- (iii) *The agreed plan of action.*

*It is irrelevant whether that agreement was ever put into practice.*²

The Court is also referring to the case 'The Republic of Malta versus Godfrey Ellul' decided on the 17 th March 2005³ where the Court held:

'We read in Archbold:

'The essence of conspiracy is the agreement. When two or more agree to carry out their criminal intent, the very plot is a criminal act itself. Mulcahy v R (1868) L.R. 3 H.L. 306 at 317; T v Warburton (1870) L.R. 1 C.C.R 274; R v Tibbits and Windust (1902) 1 .K.B. 77 at 89; R v Meyrick and Ribuffi 21 Cr.App. R 94 CCA Nothing need be done in pursuit of the agreement O'Connell versus R. (1844) 5 St.Tr.(N.S.) 1.'

'The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it; R versus Parsons (1763) 1 W.BI. 392; R versus Murphy (1837) 8 C&P 297. Proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.' R versus Brisac (1803) 4 East 164 at 171, cited with approval in *Mulcahy versus R (1868) L.R. 3 H.L. 306 at 317.'*

More recently on the 2nd November 2009, the Court of Criminal Appeal (Superior) examined this point once again and held: ⁴

'The whole point is, however, that we are here dealing with a conspiracy where there must be the meeting of at

² Court of Criminal Appeal 6th March, 2003 'The Republic versus Steven John Caddick et pages 22 and 23

³ Qorti ta' l-Appell Kriminali 10/2001 pages 29 u 30

⁴ The Republic of Malta versus Steven John Lewis Marsden 2nd November 2009

least two minds. In order to reach such a conclusion, it was necessary for the Prosecution to prove, by direct or circumstantial evidence, and beyond reasonable doubt that his conspirators, or at least one of them, were also intending to import illegal drugs. Such evidence is clearly lacking.'

In this case the Prosecution had to prove that there was a conspiracy between the defendant and third persons in Malta to import either cathinone or cathine or both because the second element required is the intention to deal in (controlled) drugs. The defendant may have conspired to import khat (in fact one person was waiting for it). However, there is no evidence that the defendant intended to import either cathinone (about the existence of which he was totally unaware) or 'cathine' (about which the defendant was knowledgeable but which did not form the object of his intention).

Hence the Court is acquitting the defendant from the first two charges.

As to the third charge – importation of cathinone – the Court refers to the forensic results which reveal that the khat imported by the defendant did not have any cathinone in it.

Hence the defendant did not import any cathinone.

Therefore the Court is acquitting the defendant of the third charge.

The fourth charge is about the importation of 'cathine'. The above remarks show quite clearly that the defendant was worried about the khat he was carrying and not the 'cathine'. It would have been a different matter had his intention been the importation of 'cathine'.

Knowledge of an underlying chemical substance is not equivalent to an intention to import that underlying substance.

Hence the Court is acquitting the defendant of the fourth charge.

The fifth charge is about possession of cathinone not limited for one's personal use. The facts reveal that there was no cathinone in the khat. Nor did the defendant *intend to possess cathinone*.

Hence the Court is acquitting the defendant of the fifth charge.

Finally the defendant is being charged with the possession of 'cathine' not for his personal use. Bearing in mind the references made above to the 'intention' of the defendant to import khat and not its underlying substance, the Court, following the principles laid down in the case 'The Police versus Khayre Aweys' is acquitting the defendant of this charge.

During the proceedings the Court noted that the Prosecution went out of its way to present the evidence in Court **as quickly as possible even at very short notice. This happened though both the experts and the drug squad are already overstretched as they have other cases to follow. Both the Prosecutor and the defence did their best to be punctual for all the court sittings. The Court is taking the opportunity to show its appreciation for the courteous way in which both the Prosecution and the defence conducted themselves throughout the proceedings though the arguments were far from easy ones.**

The defendant was offered chances of bail from his first appearance in Court and once even in the presence of a representative of the consulate of Hungary. However, he could never give a fixed address in Malta because he was short of funds and so he could not pay for a room in a hotel or a private apartment. **The only way out was to expedite the proceedings by appointing the case no fewer than seven sittings in four weeks.**

Conclusion

Informal Copy of Judgement

The Court, after having seen regulation 3(1) of LN 22 of 1985, sections 40A, 120A(1)(a)(f) (1A) 120A(1B), 120A(2)(b)(i) of Chapter 31 of the Laws of Malta acquits the defendant of all the charges preferred against him.

< Final Judgement >

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